STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

THE VILLAGE OF LINCOLN, a Michigan municipal corporation,

Plaintiff/Appellee,

v

VIKING ENERGY OF LINCOLN, INC.,

Defendant/Appellant.

Michigan Supreme Court No:_____
Court of Appeals Docket No: 246319
Lower Court Case No. 00-10619-CE(K)

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PLAINTIFF/APPELLEE VILLAGE OF LINCOLN'S RESPONSE IN OPPOSITION TO THE DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT

PROOF OF SERVICE

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INTRODUCTION

Plaintiff/Appellee (Village of Lincoln) opposes the Defendant/Appellant ("Viking") Application for Leave to this Michigan Supreme Court. Viking is wearing out the limited financial resources of the Village of Lincoln by now contesting only portions of the August 24, 2004 unpublished opinion of the Michigan Court of Appeals. **Village of Lincoln** v. **Viking Energy of Lincoln, Inc**, unpublished opinion per curiam decided [August 24, 2004] (Docket No. 246319) (**Exhibit 1**). Here, there is no basis at all to support leave under MCR 7.302(B).

COUNTER-STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT AS REQUIRED BY MCR 7.302(A)

The Village of Lincoln agrees that Viking has filed an application for leave to appeal with this Michigan Supreme Court. The Village of Lincoln further agrees that Viking is appealing the Michigan Court of Appeals unpublished opinion in this matter dated August 24, 2004. (**Village of Lincoln** v. **Viking Energy of Lincoln, Inc**. unpublished opinion per curiam, decided [August 24, 2004] (Docket No. 246319).) (**Exhibit 1**). Specifically, Viking is appealing that portion of the Court of Appeals Opinion which properly rejected Viking's argument that Ordinance 96-2 was void because of alleged procedural issues with the adoption process. The Village of Lincoln, however, does not agree that there were any procedural issues with the adoption of Ordinance 96-2 and does not believe that the Court of Appeals erred in its ruling when it rejected Vikings factual arguments in this regard. As a result, the Village of Lincoln asks that this Michigan Supreme Court deny Viking's Application for Leave to Appeal.

COUNTER - STATEMENT OF THE QUESTION INVOLVED

I. **DID THE COURT OF APPEALS ERR WHEN IT RULED THAT THE DEFENDANT/APPELLANT'S CHALLENGE TO THE PLAINTIFF/APPELLEE'S ORDINANCE ON PROCEDURAL GROUNDS WAS BARRED BY PUBLIC POLICY?**

Defendant/Appellant says:	"Yes"
Plaintiff/Appellee says:	"No"
Court of Appeals says:	"No"
Trial Court says:	Did not address this question.

I. COUNTER-STATEMENT OF THE STANDARD OF REVIEW

Viking has failed to include a section entitled "Standard of Review". The Village of Lincoln submits that the Court of Appeals reviewed the Trial Court's decision granting the Defendant's Motion for Summary Disposition, **de novo**.

> "**The decision to grant or deny summary disposition is a question of law that is reviewed de novo**". (**Venestra** v **Washtenaw Country Club**, 466 Mich. 155; 645 NW2d 643, 646 (2002).) (Emphasis Added)

II. COUNTER STATEMENT OF THE RELEVANT AND CONTROLLING FACTS

Defendant owns and operates an incinerator facility in the I-1 District of the Village of Lincoln. The incinerator stores and burns used tires and chemically treated wood. The facility is a "major emitting facility" which discharges significant pollutants to the ambient air of the local and surrounding communities. (Defendant's Response to Requests for Admission # 1, Dated July 11, 2002) (**Exhibit 2**) On February 3, 1997, the Plaintiff enacted Ordinance 96-2 which applies to Defendant's facility. (**Exhibit 3**) In part, Ordinance 96-2 makes the Defendant's facility a lawful, but non-conforming use. The following summarizes the general procedures followed in enacting Ordinance 96-2 as an amendment to the Plaintiff's Zoning Ordinance.

Statutory Cite	**Actions by Plaintiff**
MCL 125.584(1) 15 days notice of time and place of Public Hearing.	Notice published in Alcona County Review **20 days** before the date set for the Public Hearing and again 7 days before the Hearing.
MCL 125.584(1) Planning Commission must hold Public Hearing.	Public Hearing held January 22, 1997. Amendment approved letter sent to Village Council.
MCL125.584(5)	Amendment passes with 4 of 6 "yes"

2/3 Vote to pass Amendment.	votes.
MCL 125.584(7) Publication of Approved Amendment to Ordinance.	February 12, 1997. Publication in *Alcona County Review*

Section 6 of Plaintiff's Ordinance 96-2 reads as follows:

> "Section 6. Major emitting facilities which have been validly authorized to combust solid waste or solid waste fuel by a competent State authority as of the effective date of this Ordinance may continue to combust solid waste or solid waste fuel only to the extent authorized by the effective date of this Ordinance. Such combustion is hereby declared to be a non-conforming use under this Ordinance." (**Exhibit 4**)

The Defendant wholly ignored Ordinance 96-2, including Section 6. The Defendant does not contest that it sought and obtained certain State permits to expand its burning rates and increase its tonnage of tires burned from 17 tons per day to 44 tons per day. Defendant did this in July of 2000 - - almost 3 years after Ordinance 96-2 was enacted. This change in the previously "authorized" combustion is not consistent with Defendant's lawful, but non-conforming status, under Ordinance 96-2. Non-conforming uses are addressed in the Plaintiff's Zoning Ordinance at Section 6.3.

After changing its previously authorized combustion July 31, 2000, Defendant was timely notified about the ordinance violations in writing on September 5, 2000 and September 26, 2000. (**Exhibit 4**) The Defendant refused to respond or comply. On December 27, 2000, the Plaintiff filed a lawsuit asking the Trial Court to order the Defendant to comply with the Plaintiff's zoning Ordinance 96-2 and return its combustion rates to those previously in place by state authority.

On April 3, 2002, the Defendant sought administrative relief and submitted a variance request to allow it to deviate from Ordinance 96-2. The relevant portion of the "Application for Variance" submitted by the Defendant reads as follows:

> "**Said variance required is** a variance from the Village of Lincoln's Zoning Ordinance No. 96-2, adopted on February 3, 1997, to permit the Viking Energy of Lincoln, Inc. ("Viking Energy") plant in Lincoln, Michigan, to burn a maximum monthly average of 35 tons per day of tire-derived fuel, with a daily (24 hours) maximum burn of 38 tons per day of tire-derived fuel. The Viking Energy plant's limits for wood products are those authorized in the State of Michigan Renewable Operating Permit No. 199600397, issued February 15, 2002, as follows:..." (**Exhibit 5**)

Following two (2) nights of public hearings pursuant to notice, wherein Defendant appeared with its lawyers and experts and was provided unrestricted time to present its positions, the variance request to allow combustion rates above those authorized under Ordinance 96-2 was denied. Defendant appealed that denial to the Trial Court under the Trial Court's Appellate Jurisdiction.

On August 6, 2001, the Plaintiff then filed a Motion for Summary Disposition to establish -- as a matter of law -- that Defendant was violating Ordinance 96-2 and was a nuisance per se under MCL 125.587. MCL 125.587 reads as follows:

> "125.587. Violations, nuisance per se; abatement. Sec. 7. A building erected, altered, razed, or converted, or a use carried on in violation of a local ordinance or regulation adopted pursuant to this act is a nuisance per se. The court shall order the nuisance abated, and the owner or agent in charge of the building or land, or both the owner and the agent, are liable for maintaining a nuisance per se. The legislative body in the ordinance adopted pursuant to this act shall designate the proper officials whose duty it is to administer and enforce the ordinance and do either of the following for each violation of the ordinance: (a) Impose a penalty for the violation. (b) Designate the violation as a

> municipal civil infraction and impose a civil fine for the violation." (MCL 125.587)

On August 6, 2001, the Plaintiff also filed a supported Motion for Preliminary Injunction asking the Trial Court to enjoin the Defendant facility (its owner and operators) from operating in violation of Ordinance 96-2. **The Plaintiff did not, in this lawsuit or its motions, ask the Trial Court to shut down or close the Defendant's facility**. On September 23, 2002, the Defendant filed its own Motion for Summary Disposition. The Trial Court ultimately granted the Defendant's Motion for Summary Disposition. (**Exhibit 6**) In granting the Defendant's Motion for Summary Disposition, the Trial Court **first** ruled that Ordinance 96-2 violates the due process clause of the Michigan and United States Constitutions. (**Exhibit 6**) Specifically, the Trial Court ruled that Ordinance 96-2 and its regulations did not bear "any" substantial relationship to promoting the public health, safety or welfare and, as a result, violated the Defendant's due process rights. (**Exhibit 6**) **Second**, the Trial Court ruled that Ordinance 96-2 facially discriminates against the Defendants and, as a result, violates the Defendant's rights to equal protection. (**Exhibit 6**) Finally, the Trial Court ruled that the Defendant's had a right to challenge this ordinance despite its existence for years. (**Exhibit 6**) The Trial Court then granted the Defendant's Motion for Summary Disposition, denied the Plaintiff's Motion for Summary Disposition, Denied the Plaintiff's Motion for Preliminary Injunction and denied the Defendant's Appeal of the Plaintiff's denial of their application for a variance because it was now moot given the other rulings of the Trial Court. (**Exhibit 6**)

The Village of Lincoln appealed this ruling to the Michigan Court of Appeals. The Michigan Court of Appeals ruled that section 6 of the Ordinance 96-2 is unconstitutional as applied to Viking, but reversed the remainder of the Trial Court's judgment.

> "We affirm the trial court's judgment that section six of ordinance 96-2 as applied violates defendant's substantive due process rights. We reverse the remainder of the trial court's judgment. We do not retain jurisdiction." (**Village of Lincoln** at p. 4.) **(Exhibit 1)**

As a result of the Michigan Court of Appeal Opinion, the balance of Ordinance 96-2 remains valid. Specifically, sections 3 and 4 of Ordinance 96-2 are setbacks. The Court of Appeals upheld these setbacks because they have a reasonable relationship to health, safety and welfare and are otherwise consistent with State law.

On Section 5 of Ordinance 96-2, Viking did not present any evidence to challenge its reasonableness. The burden was on Viking to do so.

> "As for section five of ordinance 96-2, which regulates the storage of defendant's fuel stockpiles, neither party presented any evidence concerning that section's reasonableness. The burden of rebutting the presumed reasonableness of a zoning ordinance is on the party challenging the ordinance. *Kropf, supra* at 158. Because defendant presented no evidence showing that section five was unreasonable, the presumption of reasonableness holds. *Northville Area Non-Profit Housing Corp v Walled Lake*, 43 Mich.App 424, 432-433; 204 NW2d 274 (1972). Accordingly, the trial court erred in finding sections three, four and five of the ordinance unconstitutional. [FN2]
>
> FN2. We are uncertain why the trial court ruled on any section other than section six. Ordinance 96-2 has a severability clause (section seven), and as noted, plaintiff's verified complaint only sought enforcement of section six." (**Village of Lincoln** at p. 2.) **(Exhibit 1)**

Specifically on the issue of challenging Ordinance 96-2 as a whole, the Court of Appeals found – factually – that Viking waited too long to raise a procedural challenge to its enactment and any such claim is barred by public policy.

> "In the instant case, plaintiff enacted ordinance 96-2 in February 1997. Defendant first challenged the ordinance in March 2001. This Court has previously held that a lapse of four years after the enactment of a zoning ordinance bars a procedural challenge to a zoning ordinance. *Northville, supra* at 435. Therefore, we conclude that a challenge to plaintiff's ordinance on procedural grounds is barred as a matter of public policy." (**Village of Lincoln** at p. 4.) **(Exhibit 1)**

Viking has now brought this Application for Leave to Appeal to this Michigan Supreme Court. This serves as the Village of Lincoln's response in opposition.

III. BRIEF SUMMARY OF THE LEGAL ARGUMENT

The Michigan Court of Appeals did not err when it ruled that Viking's challenge to the Village of Lincoln's ordinance on procedural grounds was barred as a matter of public policy. Here, the Village of Lincoln enacted Ordinance 96-2 in February of 1997. Viking did not attempt to challenge this Ordinance until March 2001. The Michigan Court of Appeals had previously ruled in **Northville Area Non-Profit Housing Corp v Walled Lake**, 43 Mich App 424, 432-433; 204 NW2d 274 (1972) that waiting four years to challenge an ordinance was too long. Here, Viking waited too long. Consequently, the Michigan Court of Appeal properly ruled that Viking's challenge on procedural grounds was barred by public policy. Viking's Application for Leave to Appeal does not meet any of the grounds as contained in MCR 7.302(B).

IV. STATEMENT OF WHY THERE ARE NO GROUNDS FOR GRANTING THE DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL PURSUANT TO MCR 7.302

As this Michigan Supreme Court knows, in order for a party to seek leave from this Michigan Supreme Court it must pursuant to MCR 7.302(B) provide grounds for that application for leave to appeal which meets one of the requirements articulated within MCR 7.302(B). Here, Viking's Application for Leave to Appeal fails to have a section dedicated to demonstrating such grounds. However, buried within Viking's section entitled "Judgment Appealed From and Relief Sought" Viking attempts to argue that its Application for Leave to Appeal meets the grounds provided in MCR 7.302(B)(1) and (B)(5). It, however, does not meet the grounds articulated in MCR 7.302(B)(1) and (B)(5) or any of the other grounds contained within MCR 7.302(B).

A. MCR 7.302(B)(1) Does not Establish Grounds for Viking's Application for Leave to Appeal.

MCR 7.302(B)(1) provides that grounds can exist to grant an Application for Leave to Appeal where the issue involves a substantial question as to the validity of a legislative act.

> "(1) the issue involves a substantial question as to the validity of a legislative act;" (MCR 7.302(B)(1).)

Here, Viking claims that MCR 7.302(B)(1) applies because there is allegedly a significant public interest.

> "In support of this Application for Leave to appeal, Viking will show, consistent with MCR 7.302(B)(1), that this case which was brought by a subdivision of the State, raises an issue that has significant public interest." (Viking's Brief at p. 2.)

Here, Viking is not challenging the validity of a legislative act. In fact, Viking does not even reference the proper standard for MCR 7.302(B)(1). MCR 7.302(B)(1) does not provide grounds for granting Viking's Application for Leave to Appeal.

B. MCR 7.302(B)(2) Does Not Establish Grounds for Viking's Application for Leave to Appeal.

MCR 7.302(B)(2) provides that grounds can exist to grant an Application for Leave to Appeal where the issue involves significant public interest and the case is one by or against the state or one of its agencies or subdivisions.

> "(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;" (MCR 7.302(B)(2).)

There is no issue here of any "significant public interest under MCR 7.302(B)(2). This case is fact specific and the rulings do not run afoul of any statute, case law or public interest. There is no attack here on the right of citizens to challenge an ordinance procedurally. The factual issue here is timeliness. Viking did not act timely in this regard. MCR 7.302(B)(2) does not provide grounds for granting the Plaintiffs' Application for Leave to Appeal.

C. MCR 7.302(B)(3) Does Not Establish Grounds for Viking's Application for Leave to Appeal.

MCR 7.302(B)(3) provides that grounds can exist to grant an Application for Leave to Appeal where the issue involves legal principles of major significance to the states jurisprudence.

> "(3) the issue involves legal principles of major significance to the state's jurisprudence" (MCR 7.302(B)(3).)

As stated above, there is no issue here of any "significant public interest. This case is fact specific and the rulings do not run afoul of any statute, case law or public interest. There is no attack here on the right of citizens to challenge an ordinance procedurally. The factual issue here is timeliness. Viking did not act timely in this regard. MCR 7.302(B)(3) does not provide grounds for granting the Plaintiffs' Application for Leave to Appeal.

D. MCR 7.302(B)(4) Does Not Establish Grounds for Viking's Application for Leave to Appeal.

MCR 7.302(B)(4) provides that grounds can exist to grant an Application for Leave to Appeal where there is an appeal before a decision by the Court of Appeals.

> "(4) in an appeal before decision by the Court of Appeals,
> (a) delay in final adjudication is likely to cause substantial harm, or
> (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;" (MCR 7.302(B)(4).)

Here, the Michigan Court of Appeals has already rendered its decision. As a result, MCR 7.302(B)(4) does not provide grounds for granting Viking's Application for Leave to Appeal.

E. MCR 7.302(B)(5) Does Not Establish Grounds for Vikings' Application for Leave to Appeal.

MCR 7.302(B)(5) provides that grounds can exist to grant an Application for Leave to Appeal where the Court of Appeals decision is clearly erroneous and the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

> "(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or" (MCR 7.302(B)(5).)

Here, that potion of the Michigan Court of Appeals' Opinion rejecting Viking's argument that Ordinance 96-2 was void for alleged failure to comply with procedural requirements during the adoption process is not clearly erroneous and there is no "material injustice".[1] Here, there is no ruling which cuts-off any right to timely challenge the procedure in the adoption of a local ordinance. Viking would have this Michigan Supreme Court believe this right is now eviscerated. This is not true. The only rule applied here is one of timeliness to make such challenges.

MCR 7.302(B)(5) does not provide grounds for granting the Plaintiff's Application for Leave to Appeal.

F. <u>MCR 7.302(B)(6) Does Not Establish Grounds for Viking's Application for Leave to Appeal</u>.

MCR 7.302 (B)(6) provides that grounds can exist to grant an Application for Leave to Appeal where there is an appeal from the Attorney Discipline Board.

> "(6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice." (MCR 7.302(B)(6).)

Here, Viking has not appealed a decision from the Attorney Discipline Board. MCR 7.302(B)(6) does not provide grounds for granting Viking's Application for Leave to Appeal.

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[1] Moreover, the Village of Lincoln Ordinance remains enforceable with respect to the setbacks and restrictions contained in section 3,4 and 5. Vikings attempt to now argue factually that Ordinance 96-2 is flawed procedurally is wrong and barred.

V. LEGAL ARGUMENT

A. The Court of Appeals Did Not Err When It Ruled that Viking's Challenge of the Village of Lincoln's Ordinance on Procedural Grounds was Barred by Public Policy.

Standard of Review = De Novo

Here, the Court of Appeals properly ruled that Viking's challenge of the Village of Lincoln's Ordinance on procedural grounds was barred by public policy.

> "In the instant case, plaintiff enacted ordinance 96-2 in February 1997. Defendant first challenged the ordinance in March 2001. This Court has previously held that a lapse of four years after the enactment of a zoning ordinance bars a procedural challenge to a zoning ordinance. *Northville, supra* at 435. Therefore, we conclude that a challenge to plaintiff's ordinance on procedural grounds is barred as a matter of public policy." (**Village of Lincoln** at p. 4.)

In making this ruling the Michigan Court of Appeals relied on **Northville** where the Court of Appeals ruled that a lapse of 4 years bars a procedural challenge.

> "We come to the same conclusion--that it would be contrary to public policy to permit a municipality to strike its apparently properly adopted zoning ordinance amendment on the claim that a public official failed to perform that duty which the law imposes upon her. This we would hold as a matter of Public policy under any circumstances, and the more so where a period of approximately four years elapsed between the time the amendment was adopted and the city's attempted declaration of invalidity as in this case." (**Northville**, 204 NW2d at p. 279.)

Moreover, the Court of Appeals recently ruled that where a zoning ordinance is not challenged until several years after its enactment, a challenge on the ground that the ordinance was improperly enacted **is precluded by public policy**. In **Tittle**

v **City of Ann Arbor**, unpublished opinion per curiam of the Court of Appeals, decided [September 20, 2002] (2002 WL 31104093) (**Exhibit 7**), the plaintiff sought a declaratory judgment that a zoning ordinance was invalid because the defendant, City of Ann Arbor, failed to follow certain portions of MCL 125.584. The Court of Appeals ruled that where the zoning ordinance was not challenged for years, public policy prohibited a delayed challenge.

> "Plaintiff appeals as of right from the trial court's denial of his claim for declaratory relief. Plaintiff had sought a declaratory judgment that a zoning ordinance was invalid because defendant failed to follow the statutorily mandated procedures, MCL 125.584 in enacting the ordinance. We affirm.
>
> **The gravamen of plaintiff's challenge to the validity of the zoning ordinance is that defendant failed to comply with MCL §125.584 when it enacted the ordinance. Plaintiff's trial brief specifically contended that the zoning ordinance was not validly enacted because (i) defendant failed to hold a public hearing pursuant to MCL §125.584(1); and (ii) defendant's planning commission failed to submit a report to the city council pursuant to MCL §125.584(2). . . .**
>
> On appeal, plaintiff challenges the trial court's denial of his request for declaratory judgment. We have opined that "[w]here a zoning ordinance is not challenged until several years after its enactment, a challenge on the ground that the ordinance was improperly enacted is precluded on public policy grounds." ***Jackson***, *supra* at 493. Here, there is no dispute that the zoning ordinance at issue was enacted in 1958. There is also no dispute that the most recent amendment was in 1992. **In light of the many years that have elapsed between the original enactment of the zoning ordinance, as well as the relatively minor amendments to the ordinance after that date, we conclude that plaintiff's challenge to the enactment of the zoning ordinance is precluded on public policy grounds**. *Id.* Consequently, the trial court did not err in denying plaintiff's request for declaratory judgment." (**Tittle** v **City of Ann Arbor**, unpublished opinion per curiam of the

Court of Appeals, decided [September 20, 2002] (2002 WL 31104093).) (Emphasis Added) (**Exhibit 7**)

Here, the Court of Appeals properly ruled that Viking simply waited too long to bring its challenge.

V. CONCLUSIONS AND RELIEF REQUESTED

The balance of Viking's Application reargues the Trial Court and Court of Appeals issues. There are no grounds presented to support leave.

WHEREFORE, the Plaintiff/Appellee respectfully requests that this Honorable Michigan Supreme Court:

I. Enter an Order denying the Defendant/Appellant's Application for Leave to Appeal ; and

II. Enter an Order granting such other relief in favor of the Plaintiff/Appellee as this Michigan Supreme Court deems just equitable and appropriate.

Respectfully submitted,

O'REILLY, RANCILIO, P.C.

By: _____
Robert Charles Davis (P40155)
Attorney for Plaintiff/Appellee

Dated: November 2, 2004

PROOF OF SERVICE

I served **Plaintiff/Appellee's Response in Opposition to Defendant/Appellant's Application for Leave to Appeal** upon the attorneys of record and/or parties in this case on **November 2, 2004**. I declare the foregoing statement to be true to the best of my information, knowledge and belief.

✗ **U.S. Mail**	☐ Fax
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